

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

v.

1:19-CR-00016 (NAM)

JOSHUA VEGA,

Defendant.

APPEARANCES:

For the Government:

Alicia Suarez,
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Office of the United States Attorney
James T. Foley U.S. Courthouse
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Albany, NY 12207

For the Defendant:

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MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant Joshua Vega is charged with one count of being a Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), specifically for having a prior felony conviction and possessing a loaded Smith & Wesson model 659 9mm semi-automatic pistol bearing serial number TAL7615. (Dkt. No. 7). Defendant moves to suppress “all items seized from 516 4th Street, 1st Floor Apt., Troy, New York,” which includes the Smith & Wesson semi-automatic pistol, on the basis that the items were unlawfully seized because the police lacked valid consent for the search. (Dkt. No. 15). The Government opposes the motion.

(Dkt. No. 16). An evidentiary hearing was held on June 24, 2019, where the Court heard testimony from the individual whose consent is disputed, Latifah Parker, as well the Troy Police Department (“TPD”) Officers involved in the search, Jonathan Kebea and Stephen Bell, and TPD Evidence Technician (“ET”) Brandon Galligan, and an investigator from the Federal Public Defender, Thomas Kubisch. (*See* Dkt. No. 30, Hearing Transcript (“Tr.”)). The parties have also submitted proposed findings of fact and conclusions of law. (Dkt. Nos. 33, 35).

II. BACKGROUND

A. Arrival at the Apartment

On April 14, 2018 at approximately 2:00AM, TPD Officers Kebea and Bell were on patrol when they were dispatched to 516 4th Street in Troy to respond to a reported domestic disturbance with loud yelling and screaming. (Tr., pp. 6, 65). The address is a two-story residential building comprised of apartments on each floor and a basement unit. (Tr., pp. 8, 65–66). As they approached the building, an individual on the second floor stuck her head out of a window and pointed to the street-level apartment. (Tr., pp. 6, 65). The Officers went to the door and heard inside “some sobbing and loud talking” that sounded like a “male or female arguing.” (Tr., pp. 8, 66).

The Officers knocked on the door, identified themselves as Troy Police, and asked for the occupants of the apartment to come to the door. (Tr., pp. 13, 66). After several attempts, a female later identified as Latifah Parker poked her head out the door and exited the apartment, closing the door behind her. (Tr., pp. 13, 66). Parker agreed to speak with the Officers outside on the sidewalk. (Tr., pp. 13, 132). According to the Officers, at that point, they asked Parker if she lived at the apartment, and she told them that “she lived in the apartment and that she was the only one on the lease.” (Tr., pp. 13, 66–67, 91). But Parker testified that she told the

Officers that she lived on Congress Street, and that she showed them her driver's license with that address. (Tr., pp. 132–133). Parker also testified that she never told the Officers that she was on the lease or lived at the apartment. (Tr. 134).

B. Entry to the Apartment

The Officers told Parker they wanted to speak to whoever else was inside the apartment. (Tr., pp. 14, 134). She said that she had been inside with a friend. (Tr., p. 14). According to the Officers, they asked Parker “if we could talk to whoever the person inside was just to make sure that they were all right and that they weren't hurt or anything,” and she agreed. (Tr., pp. 15, 21, 68, 72, 85, 93). The Officers testified that Parker went back to the door to open it for them, but the door was locked. (Tr., p. 15). Then, the Officers asked Parker if she had keys, but “she stated they were inside.” (Tr., pp. 15, 68, 92). Parker testified that the keys inside the apartment were her “car keys and house key,” not a key to the apartment. (Tr., p. 135).

Next, Parker and the Officers attempted to make contact with the other individual inside the apartment. (Tr., pp. 15, 69, 92, 149). According to the Officers, Parker knocked on the door and asked for “Jose” to come to the door, and then tried the name “Josh.” (Tr., pp. 15, 68). When nobody came to the door, the Officers asked her if there was “another way you can get back into [the] apartment.” (Tr., p. 15). According to the Officers, they asked Parker if her window was open and suggested she could get into the apartment that way. (Tr., pp. 17, 54, 135). The Officers testified that Parker was able to walk up the side of the staircase to the apartment and shimmy across a ledge in front of the windows. (Tr., pp. 17–19, 93–94). The Officers stated that they did not assist Parker while she climbed up to the window and entered the apartment. (Tr., pp. 18–19, 94). Parker testified that the Officers held her hand while she

climbed up to the window, and when she was unable to fully open it, they helped her open the window and get inside. (Tr., pp. 135–37).

After entering the apartment, Parker went to the front door and unlocked it. (Tr., p. 20). According to Officer Kebea, once Parker opened the door, she “stood off to the side as like a nonverbal cue to let [the officers] walk in to talk to the other party involved in the domestic.”

(Tr., p. 20). The Officers did not ask Parker for consent to enter. (Tr., pp. 39, 160). The Officers testified that although Parker did not explicitly give them permission, they understood that they were allowed to enter the apartment “because she agreed that [the officers] could go and talk to the other party involved in the domestic.” (Tr., pp. 21, 39, 72–73, 80). Parker did not stand in the way of the Officers or make any objection to their entry. (Tr., pp. 73, 80, 110). The Officers testified that they believed Parker lived at the apartment and had given them permission to enter. (Tr., pp. 35, 85). Parker waited outside while the Officers searched for the other individual inside. (Tr., pp. 142–43).

C. Search of the Apartment

Once inside, the Officers searched the apartment for the other person involved in apparent incident, calling out “Troy Police,” but there was no answer. (Tr., p. 25). The Officers began by searching the front room and worked their way towards the back, but they found no one. (Tr., pp. 25–26). Next, the Officers entered a large closet to search for the individual, and they found the handgun at issue in this case in plain view on a shelf inside. (Tr., p. 31). They never found anybody else inside the apartment. (Tr., p. 74). After finding the handgun, the Officers returned to Parker, asking if it belonged to her. (Tr., pp. 74–75). According to the Officers, Parker then “said she did not live in the apartment.” (Tr., pp. 34, 53). The Officers

testified that this was the first time Parker indicated she did not live at the apartment, and they believed that she lived there up until that point. (Tr., pp. 34–35, 59, 75, 100, 116).

The Officers searched the apartment again to determine who lived at the apartment. (Tr., p. 34). They found mail and a utility bill lying face-up addressed to Defendant at 516 4th Street. (Tr., pp. 33–36; *see also* Government Ex. 14). After collecting Parker’s information and doing a record check, she was permitted to leave. (Dkt. No. 16-2, p. 4).

D. Parker’s Later Interview

On January 4, 2019, Parker was interviewed about the subject incident by FBI Task Force Officers Louis Perfetti and Anthony Brown. (Dkt. No. 16-8) (the “Audio Interview”). The Court will discuss the details of that interview as necessary below.

III. DISCUSSION

Defendant argues that the search of his home violated the Fourth Amendment because the police did not have valid consent from Parker. (Dkt. No. 15, p. 5). In response, the Government asserts that the police reasonably believed that “Parker had apparent authority to consent to such a search” because she said that “the apartment was her apartment and that she was the only person on the lease.” (Dkt. No. 16, p. 11). The parties also disagree as to whether the search was justified by exigent circumstances. (*See* Dkt. No. 33, p. 14; Dkt. No. 35, p. 26).

A. Third-Party Consent to Search

The Fourth Amendment prohibits “unreasonable searches” by the government. U.S. CONST. amend. IV. It is well-established that warrantless searches are unreasonable, subject to certain limited exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). One such exception permits a warrantless search when conducted pursuant to voluntary consent. *Id.* Therefore, the warrantless search of property does not violate the Fourth Amendment when

proper consent is voluntarily given. *See United States v. Matlock*, 415 U.S. 164, 165–166 (1974). When the government seeks to justify a warrantless search by proving voluntary consent, it is not required to show that consent was given by the defendant. Rather, they may show “that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *Matlock*, 415 U.S. at 171. Consent can be found “from an individual’s words, acts or conduct.” *United States v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993) (citation omitted).

In general, when it comes to the many factual determinations that must regularly be made by agents of the government, what is required is not “that they always be correct, but that they always be reasonable.” *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). “As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?” *Id.* at 188 (citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (internal quotations omitted)). The Fourth Amendment requires law enforcement officials to apply their reasonable judgment when assessing whether there exists authority to consent to a search. *Id.* at 186.

The burden of establishing valid consent for a police search rests upon the government. *See Schneekloth*, 412 U.S. at 222. In order to meet it, the government must show by a preponderance of the evidence that the consenting party freely and voluntarily gave her consent to search. *United States v. Miley*, 513 F.2d 1191, 1201 (2d Cir. 1975). “So long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search.” *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995).

In this case, the Court must determine whether Parker gave the police valid consent to enter and search Defendant's apartment. This issue turns on what information she conveyed to the police about her relationship to the apartment and whether the police reasonably believed that she possessed authority to consent to their warrantless search.

The Officers testified that, before they entered the apartment, Parker told them she lived there and that she was on the lease, and based on this information, they believed she lived there. (Tr., pp. 59, 75). Further, they testified that Parker agreed to let them do a welfare check inside the apartment, and she voluntarily went in through the window and opened the door for them. (Tr., pp. 20, 72, 110–111). And they testified that Parker only revealed that she did not live at the apartment after they found the handgun inside. (Tr., pp. 34–35, 74–75, 100). This testimony is consistent with the Officers' affidavits, (Dkt. Nos. 16-1, 16-2, 16-3), and the Court found them to be credible witnesses.

On the other hand, Parker testified that, before the Officers entered the apartment, she told them that she lived at a different address and showed them her driver's license with that address. (Tr., pp. 132–33). Parker denied telling the Officers that she lived at the apartment or was on the lease. (Tr., p. 134). Parker said that the Officers suggested she go through the window, helped her inside, and told her to open the door. (Tr., pp. 135–38). However, Parker's testimony raises serious doubts about her credibility. First, Parker admitted that she was intoxicated the night of April 14, 2018, and that she had been drinking "all night." (Tr., pp. 129, 150–51). She testified that she "sobered up once [she] saw police," but also that she told the Task Force Officers she probably said it was her apartment "because [she] was intoxicated." (Tr., pp. 129, 151, 158). Second, there were inconsistencies in Parker's testimony, as compared with her FBI interview. Parker testified that she never told the police that it was her apartment.

(Tr., p. 163). But in the interview, she admitted that “[she] probably lied a little bit” to the police and “said it was [her] crib,” later repeating that she lied “about it being [her] apartment.” (*See* Audio Interview at ~ 57:54, 1:05:00). Parker also testified that she showed the Officers her driver’s license before they entered the apartment, a fact that went unmentioned in the interview. Parker’s story also varied regarding her entry into the apartment. She testified that the police officers “directed [her] how to get into the window” by holding her hand while she climbed up to the window. (Tr., p. 138). However, in the interview, she said that they “picked [her] up and put her through the window.” (Audio Interview at ~ 11:45, 12:43). Third, Parker had a motive to lie at the hearing based on her personal relationship with Defendant; the two were contemplating marriage as recently as January 2019. (Tr., p. 155). Although Parker claimed that they were “not dealing with each other” as of April 14, 2018, she admitted that she dated him off and on since 2016. (Tr., pp. 152–53). And yet Parker testified that April 14, 2018 was the first time she visited Defendant’s apartment at 516 4th Street. (Tr., pp. 125–26).

For these reasons, the Court gives credence to the Officers’ testimony and not Parker. Defendant suggests that the Court should hold that, “in the absence of a specific request by police for permission to enter a home, Parker’s failure to object to such entry is not sufficient to establish free and voluntary consent.” (Dkt. No. 33, p. 18). But the Court finds that Parker conveyed to the Officers that she lived at the apartment and consented to the search, both by her words and actions. She agreed to let the Officers check inside the apartment for the other person in the domestic incident, went inside, opened the door for them, and stood aside as they went about the search. This amounts to express and implied consent for the search.

Furthermore, the Court finds that the Officers reasonably relied on Parker’s consent. Defendant argues that Parker’s inconsistent statements to the Officers about who was inside and

what she was doing there “would have given a reasonable officer valid reason to question her credibility and thus her ability to give consent to conduct a warrantless search of the apartment.”

(Dkt. No. 15, p. 6). However, when the Officers asked where she lived, Parker consistently stated that she lived in the apartment, right up until they discovered the gun—which gave her every reason to change her tune. Finally, the Court finds that Parker gave consent freely and voluntarily. There is no evidence of coercion, and Parker was not so intoxicated as to lack the ability to understand and communicate with the Officers.

Accordingly, the Government has met their burden to show that the police were reasonable in believing that Parker possessed the authority to consent to the warrantless search of the apartment, even if that belief was mistaken. Thus, the search of the apartment based on her valid consent did not violate the Fourth Amendment, and Defendant’s motion to suppress must be denied.¹ *See Rodriguez*, 497 U.S. at 186.

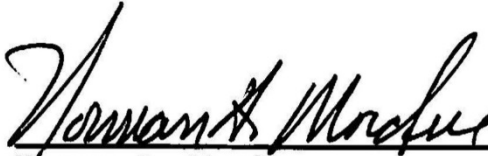
IV. CONCLUSION

For these reasons, it is

ORDERED that Defendant’s motion to suppress (Dkt. No. 15) is **DENIED**.

IT IS SO ORDERED

Dated: August 22, 2019
Syracuse, New York


Norman A. Mordue
Senior U.S. District Judge

¹ Since there was valid consent, the Court need not consider the issue of whether exigent circumstances also justified the search.